SANGUINE LIMITED

IBLA 97-576 Decided July 26, 2001

Appeal from Decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, denying appeal of three Minerals Management Service orders to pay late payment interest on gas royalties. MMS-95-0659-IND, MMS-95-0698-IND, MMS-96-0333-IND.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Oil and Gas Leases: Royalties: Interest--Oil and Gas Leases: Royalties: Payments--Payments: Generally

   Appellant's lease and applicable regulations specified that royalty would be determined by major portion analysis. Even though the Department did not perform such analysis until compelled to do so years after production had occurred by agreement settling litigation in Kauley v. Lujan, appellant knew or should have known that its Indian lease gas production was being valued by a method other than major portion analysis, and consequently, it was on notice that it could be responsible for additional royalties.

2. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Oil and Gas Leases: Royalties: Interest--Oil and Gas Leases: Royalties: Payments--Payments: Generally

   Where nonpayment or underpayment of royalties by the end of the month following the month in which the production occurred is established, MMS properly assesses interest for late payment of royalties under section 111(a) of the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1721(a) (1994). That result is not changed when the impetus for recalculating royalties is an agreement between the Federal government and

Indian lessors settling class action litigation years after the production in question had occurred.

3. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties: Generally--Statute of Limitations

Late payment charges are not a penalty; they are assessed to compensate the lessor for the time value of money owing and not timely paid.

4. Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties: Generally--Statute of Limitations

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior to determine an obligation to pay royalties, demands for additional royalty, or demands for interest on late royalty payments.

APPEARANCES: Robert H. Bethea, Esq., James M. Chaney, Esq., Oklahoma City, Oklahoma, for appellant; Howard W. Chalker, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Minerals Management Service; Jill E. Grant, Esq., and Stephen H. Greetham, Esq., Washington, D.C., for *amicus curiae*, the Jicarilla Apache Tribe.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Sanguine Limited (Sanguine) has appealed from a March 12, 1997, Decision of the Deputy Commissioner of Indian Affairs (Deputy Commissioner), Bureau of Indian Affairs (BIA) denying Sanguine's appeal of three orders issued by the Minerals Management Service (MMS), directing Sanguine to pay late payment interest based upon recalculated royalty for oil and gas leases on allotted Indian lands.

MMS recalculated royalty for allotted Indian lands oil and gas leases pursuant to the terms of an agreement to settle a class action against the Department of the Interior (the Department) filed by enrolled members of the Cheyenne-Arapaho Tribes of Oklahoma in Kauley v. Lujan (No. 84-3306T, W.D. Okla.) on December 14, 1984 (the Kauley Settlement). That lawsuit alleged that the Department had failed to comply with the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. §§ 1701, 1714, 1721 (1994), by failing, among other things, to make timely deposits of royalty payments to individual Indian money accounts, failing to pay interest for late deposits (30 U.S.C. § 1721(d)), failing to accurately determine royalties due, failing to audit, and failing to reconcile current and past

accounts for oil and gas leases and make additional collections as warranted. Sanguine was not a party to the lawsuit.

The Kauley Settlement was accepted and approved by the district court in an order filed December 6, 1991. Among other things, the parties agreed to a "major portion analysis" methodology which establishes majority price by one of three pricing mechanisms, the highest of which, in turn, establishes value for purposes of calculating royalty. The minimum values thus established were provided to payors, including appellant, with the direction to recalculate and submit any additional royalties and late payment charges. (Sec. 19(a)-(d) of Kauley Settlement, Attachment C to Field Report dated February 5, 1996.)

In an August 4, 1992, letter to Sanguine, MMS informed Sanguine of the Kauley class action and settlement, and notified Sanguine of a likely royalty underpayment as the result of performing a major portion analysis on Indian lease gas sales from January 1986 to 1990. MMS advised that the letter was not an official order to pay and asked Sanguine to review, within 60 days, attached lists of values.

MMS and Sanguine corresponded from October 1992 to July 1994, during which Sanguine noted, and MMS corrected, a number of significant errors in MMS' pricing data. Ultimately, in 1995, MMS issued invoices for additional royalties due. Sanguine timely paid these invoices and did not appeal them. MMS then issued the three orders disputed here, directing Sanguine to pay late payment interest on majority pricing royalty adjustments from 1986 forward. 1/

On October 5, 1995, Sanguine filed an appeal of the three orders with the Chief of the Compliance Verification Division, MMS, Denver, Colorado, asserting that it should not be liable for late payment interest charges assessed on the additional royalties it had paid as a result of the Kauley Settlement. By letter dated November 30, 1995, Sanguine filed a supplemental statement of reasons (SSOR). In February and March 1996, MMS prepared Field Reports recommending denial of the appeals. Sanguine was afforded the opportunity to respond to the Field Reports, and on March 11, 1996, it did so by incorporating a significant portion of the November 30, 1995, SSOR.

In that SSOR, Sanguine contended that it had timely paid royalty when it was originally due and again when additional royalty was billed. Sanguine acknowledged that the regulations implementing FOGRMA provide for

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1/ The three orders directed appellant to pay the following amounts. IBIL 06950333 was issued August 30, 1995, in the amount of $279, which included late payment interest of $234.15, plus $44.85 which was not contested (MMS-95-0659-IND). This invoice was paid under protest. IBIL 07950236 was issued September 28, 1995, for $60,749.88, including $60,744.46 in late payment interest, plus $5.42 which is not contested (MMS-95-0698-IND). Appellant posted a bond for the disputed amount. Lastly, IBIL 05960352 was issued July 23, 1996, for $15,966.70 in late payment interest (MMS-96-0333-IND).

major portion analysis, and that 30 CFR 206.152(a)(3)(i) (1995) 2/ specifically provided that the Secretary may consider the highest price paid or offered in determining the value of production specifically on Indian leases for royalty purposes. (SSOR at 1.) However, Sanguine asserted that in the absence of prior knowledge of the majority price recalculation by MMS, the additional royalties only became due following the conclusion of MMS's majority pricing analysis (SSOR at 3-4), and these were timely paid, like the original royalty amounts. (SSOR at 3, 7.)

Sanguine further contended that MMS and this Board have recognized situations in which additional royalty payments were not due until MMS changed gas value pursuant to a major portion analysis. (SSOR at 4-5.) Appellant cites Oxy USA Inc., 123 IBLA 383 (1992), which involved a retroactive price increase for gas that required approval from the Federal Energy Regulatory Commission (FERC), and Cities Service Oil & Gas Corp., 104 IBLA 291 (1988), where the date when royalty became due was set by reference to the date when the Bureau of Land Management approved the formation of a unit. (SSOR at 4.) If interest properly was due, appellant asserted that it should be calculated from the dates of appellant's receipt of the MMS royalty invoices, and not from 1986 forward. Appellant argued in the alternative that the interest should be waived because there was no way Sanguine could have known of the additional royalty obligation until after MMS had completed majority portion calculations, calculations which Sanguine was not obligated to perform. (SSOR at 4-5.) Sanguine further argued that due to the statute of limitations at 28 U.S.C. § 2415 (1994), "MMS may not assess interest which has accrued by virtue of additional payments due before April 1989." (SSOR at 8.)

In response, the Deputy Commissioner's decision stated that the due date for timely payment of royalty is at the end of month following the month during which oil and gas is produced and sold, citing 30 CFR 218.50. The decision observed that MMS is obliged to charge interest on late payment and underpayment under FOGRMA, 30 U.S.C. § 1721 (1994) and implementing regulations 30 CFR 218.54 and 218.102, and declared that assessment of late payment charges compensates the lessor for the time value of money. The decision noted that, according to a provision of Sanguine's leases, royalty was to be calculated on the basis of highest price paid or offered for like quality gas in the same field, and thus the leases had always been subject to a major portion analysis. (Decision at 3.) Finding that the Indian lessors originally had received less than the full royalty to which they were entitled, the Deputy Commissioner held that MMS had correctly billed late payment interest. Lastly, the decision also concluded that the 6-year statute of limitations in 28 U.S.C. § 2415 (1994) is inapplicable

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2/ Regulation 30 CFR 206.152 (1995) was later recodified as 30 CFR 206.172. 61 FR 5467 (Feb. 12, 1996). Where regulations have been recodified, the Board will cite the regulation in effect in 1995, when the orders in MMS-95-0659-IND and MMS-95-0698-IND were issued, and will hereafter also cite the current regulation as a parallel cite for MMS-96-0333-IND.

to administrative proceedings. The Deputy Commissioner denied the appeal and Sanguine appealed to this Board.

In its April 30, 1997, Notice of Appeal, Sanguine stated that it adopted and incorporated by reference most of the rationale, arguments and authorities previously presented before MMS. 3/ MMS ultimately responded with a Motion to Dismiss (Motion) for failure to file an SOR, asserting that repeating the arguments presented to MMS by reference thereto does not constitute an affirmative explanation of why the decision is incorrect. That Motion was denied in the Board's order dated February 4, 2000. In that order, we also requested an answer from MMS, including its responses to three questions posed by this Board, and established a briefing schedule. On July 25, 2000, the Jicarilla Apache Tribe (the Tribe) moved to intervene on MMS' behalf, which motion was granted over Sanguine's objection by order dated August 8, 2000. 4/

The issues presented to this Board are: whether royalty was due before the date when MMS conducted a major portion analysis following settlement of the Kauley litigation, such that interest should be calculated as of the date of the royalty readjustment billing rather than the month following the month in which gas was produced (SSOR at 3-5); whether MMS' decision to impose late payment interest was arbitrary and capricious and an abuse of discretion (SSOR 5-7); whether the interest charge violates Sanguine's constitutional rights (SSOR at 7); whether interest is barred by the provisions of 28 U.S.C. § 2415(a) (1994) (SSOR at 7-8); and to the extent interest is due, whether equity requires MMS to pay it, since only MMS had the capability to conduct a major portion analysis (SSOR at 4-5).

[1] We begin with Sanguine's overarching assertion that no additional royalty could be due before a major portion analysis was actually performed by MMS. Sanguine argues that it is inequitable to require Sanguine to pay late payment charges for MMS' failure to calculate royalties using that method until compelled to do so by court order, because

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3/ In that notice of appeal, Sanguine stated that the circumstances of the case were "virtually identical" to those in MMS-95-0698, and therein incorporated by reference only the first three arguments. However, in its Response to the Field Report in MMS-95-0698 (Response), Sanguine again raised the issue of the applicability of the 6-year statute of limitations prescribed by 28 U.S.C. § 2415(a) (1994), and in addition, sought to characterize the interest here at issue as a penalty. (Response at 3.) We will rely upon and cite the Nov. 30, 1995, SSOR in articulating Sanguine's reasons for appeal to this Board, because it appears to be a more complete presentation of Sanguine's position.

4/ After the Board had granted the motion to intervene, the Tribe advised this Board that it was not a lessor or a royalty owner of any of Sanguine's leases. The Tribe's leases contain the same major portion analysis provision at issue in this appeal, however. Upon receipt of this clarification, rather than issue a further order, the Tribe's brief was considered and accepted as an amicus brief in support of MMS' position.

MMS was the only party with the authority or capability to perform the analysis, and the data was not available until 1994. Also embedded in this argument is the suggestion that additional royalty obligations due to a major portion analysis could not be foreseen. (SSOR at 3-7.)

We take a different view of the matter. As Sanguine acknowledges, the regulations provided for the use of major portion analysis for the valuation of Indian gas, even in the absence of the Kauley Settlement. 30 CFR 206.152(3)(i) (1995) (unprocessed gas) and 206.153(3)(i) (1995) (processed gas). This requirement has been in effect since March 1, 1988, 53 FR 1230, 1274 (January 15, 1988), and has been a common provision of Indian leases, 53 FR 1246 (January 15, 1988), including Sanguine's leases.

Thus, Sanguine knew or should have known that its gas production was being valued for royalty purposes by a method other than major portion analysis, and that such other method did not comport with a specific term of its leases. Sanguine therefore also knew that the day could come when it and the Department would be required to account for production using the method specified by the lease, and that, as a consequence, it could owe more, or less, royalty than it had paid at the time of production. 5/ See Peabody Coal Co., 155 IBLA 83, 94 (2001). The fact that litigation was necessary to compel the Department to apply the methodology that had been required by the lease and by 30 CFR 206.152(3)(i) (1995) (unprocessed gas) and 206.153(3)(i) (1995) (processed gas) since March 1, 1988, ultimately matters not at all.

[2] With respect to Sanguine's contention that charging interest from the relevant gas production dates rather than from the date that the additional royalty obligation was quantified is arbitrary, capricious, and an abuse of discretion, this argument also must fail. Royalty payments are due at the end of the month following the month during which the oil and gas is produced and sold, unless that date falls on a weekend or holiday, in which case the payment is due on the first business date of the succeeding month. 30 CFR 218.50. The provision appears in Sanguine's leases as sec. 3(c), which provision further states that royalty would be calculated on the basis of the highest price paid or offered *at the time of production*. Irrespective of the Kauley Settlement, the fact is that the royalty obligation is triggered by the production of gas from the lease. Thus, this situation is not very different from a recalculation of royalty due following an audit where late payment interest is assessed from the month following that in which production occurred, not when the audit

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5/ In Delgado v. Department of the Interior, the lessors were members of the plaintiff class is Kauley v. Lujan for whom MMS performed a major portion analysis. In that instance, the Delgado lessees had received prices that equaled or exceeded the fair market value of other production in the area. Shirley Delgado v. Acting Anadarko Area Director, Bureau of Indian Affairs, 27 IBIA 65, 82 (1994), affirmed Delgado v. Department of the Interior in an unpublished decision, 153 F. 3rd 726 (10th Cir. 1998), 28 ELR 21523, 21524 (1998).

determines additional royalty is due. Amoco Production Co., 78 IBLA 93, 100 (1983). 6/ We have often declared that the late payment assessm
ent is not a penalty, but instead is equivalent to the time value of money to the lessor. Peabody Coal Co., supra, at 90; Coastal Oil and Gas Corp., 108 IBLA 62, 67 (1989); Cities Service Oil & Gas Corp., 104 IBLA 291, 295 (1988). Therefore, the date due is properly tied to the date of production rather than to dates of settlement or recalculation.

[3] Appellant's argument that the assessment of interest was arbitrary and capricious is equally unfounded. MMS is obliged by statute to charge interest on late royalty payments and underpayments. Section 111(a) of FOGRMA, 30 U.S.C. § 1721(a) (1994), provides: "In the case of oil and gas leases where royalty payments are not received by the Secretary on the date such payments are due, or are less than the amount due, the Secretary shall charge interest on such late payments or underpayments." Similarly, 30 CFR 218.54 states that "[a]n interest charge shall be assessed on unpaid or underpaid amounts from the date the amounts are due." See also 30 CFR 218.55. Accordingly, where nonpayment or underpayment of royalties by the date due is established, the Government must assess late payment charges. Marathon Oil Co., 128 IBLA 168, 171 (1994); Oxy USA, Inc., 125 IBLA 308, 310-11 (1993).

Such late payment charges are not a penalty; they merely compensate the lessor for the time value of money owing but not timely paid, the use of which the lessee enjoys during the period the amount is unpaid. See, e.g., Coastal Oil and Gas Corp., supra; Peabody Coal Co./Hopi Tribe, 72 IBLA 337, 348 (1983); Atlantic Richfield Co., 21 IBLA 98, 108, 82 I.D. 316, 322 (1975).

As to Sanguine's allegation that imposition of the late payment charges is violative of its Constitutional rights, we lack jurisdiction to entertain such an argument, and accordingly, it is dismissed.

[4] Appellant's argument that the statute of limitations at 28 U.S.C. § 2415(a) (1994) bars MMS from assessing late payment interest also must be rejected. This statute provides that "every action for money damages brought by the United States * * * which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." Such statutes of limitation affect the remedies available to a claimant, not the merits of the underlying right to recover. United States v. Studivant, 529 F.2d 673 (3rd Cir. 1976). Even where one remedy is barred by a statute of limitations, other remedies may remain available. Forest Oil Corporation, 111 IBLA 284, 286-7 (1989).

6/ Aff'd, No. 84-0916 "L" (W.D. La. Feb. 5, 1986), 627 F.Supp. 1375; vacated for lack of jurisdiction and remanded to W.D. La. for transfer to Ct. Cl., 815 F.2d 352, (5th Cir. April 29, 1987); cert. denied, 487 U.S. 1234 (1988); aff'd, No. 344-87L, 17 Cl. Ct. 590 (Cl. Ct. Aug. 7, 1989).

It is well settled that statutes establishing time limitations for the commencement of judicial actions for damages on behalf of the United States do not limit administrative proceedings within the Department of the Interior, MMS' demands for additional royalty, or late payment charges therefor. W.A. Moncrief, Jr., 144 IBLA 13 (1998); Oryx Energy Co., 137 IBLA 177, 182 (1996), and cases cited therein; Marathon Oil Co., 128 IBLA 168, 170-71 (1994); Anadarko Petroleum Corp., 122 IBLA 141 (1992). Such proceedings to determine the obligation to pay royalty do not constitute judicial action to collect the amounts due. See S.E.R. Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); Alaska Statebank, 111 IBLA 300, 311-12 (1989). Appellant's reliance on Phillips Petroleum Co. v. Lujan, 963 F.2d 1380, 1386 (10th Cir. 1992), therefore is misplaced, as that case explicitly affirmed a prior decision, Phillips Petroleum Co. v. Lujan, 951 F.2d 257 (10th Cir. 1991), which stated that "although § 2415 may provide a legitimate defense to a claim for underpayment of royalties, it does not apply to limit [the Department's] right under FOGRMA to order lessees to maintain and provide records. 951 F.2d at 259-60."

In any event, it is not within our authority to determine whether the statute of limitations would bar a judicial suit to collect royalty deemed owing on a lease. Such determination is properly made by the court before which any collection proceeding is brought. Oryx Energy Co., supra, at 183, and cases cited.

As noted, appellant makes the point that it could not have conducted the major portion analysis itself to avoid incurring interest charges, as only MMS had the capability and requisite data to do so. Appellant concludes that, to the extent that the assessment of late payment interest is correct, equity demands that it be waived or that MMS pay it. For the reasons stated, we do not perceive the inequity Sanguine asserts. There is no statutory or regulatory authority by which MMS could be held liable for payment of a lessee's late payment charges. Second, Sanguine has enjoyed the time value of the money, not MMS. Third, whatever perceived inequity flows from MMS' failure to value production on the basis of major portion analysis before the Kauley lawsuit compelled it to do so, it would be manifestly unjust to shift the cost and burden to the Indian lessors. See Sun Oil Co., 91 IBLA 1, 48-49, 93 I.D. 95, 120-21 (1986), aff'd sub nom. Clark Oil Producing Co. v. Hodel, 667 F. Supp. 281, 292 (E.D. La. 1987). Fourth, interest owed to Indian lessors cannot be waived. 30 CFR 218.102(a). 7/

7/ Even in the absence of a regulation prohibiting waivers of interest owed Indian lessors, we would not hesitate to find that Sanguine's situation is factually and legally distinguishable from those presented in Oxy USA, Inc., supra, and Cities Service Oil & Gas Corp., supra, such that a waiver would not be appropriate under those cases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR § 4.1, the decision of the Deputy Commissioner of Indian Affairs is affirmed.

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T. Britt Price
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge